No. 12601

IN THE

United States
Court Of Appeals

For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

— vs. —

TIGHE E. WOODS, Housing Expediter,
Office of Housing Expediter,

Appellee.

Brief Of Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

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Bozeman, Montana.

BOZEMAN CHRONICLE PRINT

INDEX

CITATIONS

STATUTES AND TEXT BOOKS

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Statement of Proceedings

Complaint.

The Complaint in this action is in the name of TIGHE E. WOODS, Housing Expediter, under Housing Rent Act of 1947 (50 U.S.C.A. App. Sec. 1881-1902 as extended and amended by Public Laws 422 & 464 of the 80th Congress). The Complaint alleges that jurisdiction is vested in the United States District Court of Montana under Section 206 (b) of the Act.

The Complaint sets forth that B. M. CRENSHAW and JANE DOE CRENSHAW (the action as to Jane Doe Crenshaw was alter dismissed and the only defendant is actually B. M. CRENSHAW); was the landlord and operator of a housing accommodation known as Crenshaw Apartments at 6 West Babcock, Bozeman, Montana, within the Bozeman defense-rental area. That it was the opinion of the Housing Expediter that appellat had violated the act by *receiving* and *collecting* from tenants occupying apartments in the accommodation and *collected rentals* (emphasis our own) in excess of the maximum legal rents fixed and established by law and had violated the Act by giving 30 day notice of evictions to certain tenants who refused to pay in excess of the maximum rent.

By reference there were then set forth sixteen violations detailed as shown in the Transcript at page 5, totaling $2,087.50. The prayer was first for an injunction restraining the appellant from receiving or collecting rents in excess of the maximum legal rentals on any of the apartments and from evicting tenants who refused to pay in excess of the legal ceiling; second, for the

restoration and refund to tenants overcharged, and third, for costs (Tr. 5).

From the Complaint (Tr. 5) it should be noticed that there were thirteen tenants named occupying variously fourteen different apartments, some occupying two different apartments and one occupying three different apartments.

Answer.

The appellant's, B. M. Crenshaw's, Answer admitted that the Plaintiff brought the action and claimed jurisdiction as alleged in the Complaint. Appellant alleged that he operated only as agent for trustee to whom all control and rents were assigned (Tr. 6, 7, par. 2) and denied any violations as alleged in the Complaint, and demanded trial by jury. The trial by jury was denied on the grounds that this, by reason of the plea for relief by injunction, was an *equity* case.

STATEMENT OF THE CASE

At the beginning of the trial on motion of Attorney, Ernest A. Peterson, and agreement by C. E. Knowlton, Attorney for the appellee, motion for dismissal as to Jane Doe Crenshaw was granted (Tr. 28-29). Early in the trial a stipulation was entered into (Tr. 65) concerning the orders made by the rent director for apartments numbered 21, 20, 24, 36, 37 and 48, and that after the registration dates the different apartments were variously changed so as to permit up to $65.00 and $75.00 and then back to $50.00 for apartment No. 20; that apartment No. 24 was changed from $50.00 to $65.00; that apartment No. 36 was changed from $30.00 to $40.00; that apartment No. 37 was changed from $35.00 to

$40.00 and that on the face of the records copies of the orders for such changes were placed in the United States mail.

It is the contention and testimony of the appellant and his attorney who was authorized to receive such notices, that none of them was ever received by either of them (Tr. 106, L. 11-24; Tr. 117 L. 11-15; Tr. 141 L. 6-13; Tr. 155 L. 1-12; L. 19-33). There was no testimony to the contrary.

That the appellant did have notice by having shown to him by tenants copies of notices of change, particularly on Apartment No. 24, 22, and 20; that all of the apartments were exactly alike except a few two-bedroom apartments (which apartments are not here in question) and that having notice of one apartment price change was to him tantamount to a change for all, since he did not receive any notices on any of the apartments from the Area Rent Director or Local Rent Director but only through tenants (Tr. 86, L. 7-13; Tr. 85 L. 9-15; Tr. 105 L. 13-33; Tr. 106 L. 1-29).

When a notice is mailed, there is a presumption of delivery, but in 66 C.J.S., p. 665, we find the following text:

> "A notice duly mailed will be presumed to have been delivered, but this presumption is rebutable, as discussed in Evidence, Sec. 136."

Under the heading of Evidence in 31 C.J.S., p. 785, we find the rule applied that presumption of due receipt of a letter or other mail matter may be rebutted by evidence that it was not in fact received. (Renland vs. First Nat'l Bank, 4 P. 2d 488, 90 Mont. 424).

The testimony of appellant Crenshaw and his attorney denies that he ever received any of the rent orders.

According to some authorities, addressee's positive denial of receipt of mail matter renders the presumption of little weight (Gibson vs. Rouse, 142 P. 464, 81 Wash. 102).

Or may even entirely overcome the presumption especially if uncontradicted (U. S. - Ripy vs. Cloverleaf Life & Casualty Co., C.C.A. Tex. 9 Fed. 2d 324).

And it has been held that such denial or other proof of non-recepit raises a presumtion that the letter was never mailed.

Idaho - Hobson vs. Security State Bank 57 P 2d 685, 57 Ida. 601.
Mullock vs. Citizens Nat'l Bank of Salmon, 250 P. 648, 43 Ida. 214.
50 A.L.R. 1418
N. H. Wilson vs. Frankfort Marine Accident & Plate Glass, 91 A. 913, 77 N. H. 344
Okla - Kneeling vs. Travelers 67 P. 2d 944, 180 Okla. 99
Texas - Border State Life Ins. Co. vs. Noble, Civil App. 133 S. W. 2d 119.

In 30 Am. Jr. p. 247 Sec. 28 we find the rule set forth that where notice was properly mailed its receipt will be presumed in the absence of evidence to the contrary, and the deposit in a street letterbox or delivery to a mail carrier on duly is considered a proper mailing. This presumption may be overcome by evidence that the notice never was in fact received.

Bickerdike vs. Allen 157 Ill. 95, 41 N. E. 740, 29 L.R.A. 782

Casco Nat'l Bank vs. Shaw 79 Me. 376, 10 A. 67, 1 Am. St. Rep. 319
Huntley vs. Whittier, 105 Mass. 391, 7 Am. St. Rep. 536
Vann vs. Marbury 100 Ala. 438, 14 So. 273, 23 L.R.A. 325, 46 Am. St. Rep. 70.

By Section 93-1301-7 (24) Revised Codes of Montana 1947, under what are denominated disputable presumptions, it is provided that a letter duly directed and mailed was received in the regular course of mail. By said statute it is declared that disputable presumptions are satisfactiry if uncontradicted. We submit that a presumption of this kind, if contradicted, ceases to be satisfactory evidence and evidence which is not satisfactory by Section 93-301-13, Revised Codes of Montana, 1947, is slight evidence. Satisfactory evidence is required to establish a fact.

A search of the record in this case fails to disclose mailing of notices by any particular person. However, the record does show that it was the practice of the Bozeman Office to mail such notices. Therefore, it appears that the presumption that notices were mailed is entirely overcome by the testimonly of the appellant Crenshaw who denied the notice of such rent orders.

The appellant further contends that he is entitled to any reasonable agreed amount for furnishing, at the tenants' special request, other and extra furniture or extra services sush as storage or moving.

The appellant further contends that he should not be charged in the judgment where the tenant owes him rent in excess of the overcharge as appears in three instances (Tr. 93 L. 3 & 4; Tr. 94 L. 4; Tr. 101 L. 10; Tr. 104 L. 3 & &4); these show that Victor Barkley owes

$100.00 and that R. C. Gregor owes $105.00; and J. M. Ashmore woes $385.00 all on rentals at that time.

The appellant also testified and it is not denied that he rented to Carl Jones by the week (Tr. 10 L. 21 & 22) and contends that rentals by the week are not under the rent controls, i.e. that only bi-monthly, monthly, and upward are under the rent control as they pretain to housing accommodations.

It is further the contention of the appellant that all of the apartments with the exception of apartments not here in question being equal, he was entitled to believe and did believe that the director of rent control would not, by his own order without request from the appellant, or notice to appellant, create a mis-comparability in such a case as this one where all apartments were known to him to be alike (Tr. 73 L. 25-31; Tr. 73 L. 32 & 33; Tr. 74 L. 1-18); in this connection it is the appellant's firm belief and contention that the area and local rent director have by their own acts so scrambled, without notice, the amounts chargeable for various identical apartments as to place this appellant in jeopardy, as in this case, and have treated their delegated (sic) authority to the disadvantage and danger of this appellant whether by intrigue, carelessness or misapplications of their powers, and that therefore, the appellant should not by those acts be penalized (see Zajac v. McNulty Misc. 1944, 51 N.Y. S. 2d 484, and Kimmelman v. Tenenbaum 1944, 50 N.Y. 2d 912, 182 Misc. 558).

The Act in its inception and under all of its amendments was enacted to prevent hardships to persons engaged in business as well as for tenants and others (Act

of January 30, 1942, see 26-56 Statute 23 Title 50 Sec. 901 U.S.C.A.).

He who seeks equity must do equity.
Royal Neighbors of America vs. Lowary 46 Fed (2d) 565
Dern vs. Tanner 60 Fed (2d) 626

EQUITY IS EQUALITY

State vs. Wibaux of Wibaur 281 Pac 341, 85 Mont. 532 American Surety Co. of New York vs. Mullendire 505, S. Ct. 239

The Complaint so far as amounts adjudged to be overcharges in this case are concerned, and the claims therefor and the judgment particularized as viewed by the appellant shows:

Tenant	Apt.	Complaint	Judgment		Over
John R. Durham	1	$440.00	$480.00		$40.00
Victor B. Barkley	8	50.00	41.50	Note 1	
J. M. Ashmore	37 & 9	130.00	190.80	Note 2	60.80
M. C. Davis	12	80.00	70.00		
John Vallee	20, 21, 16	530.00	211.66		
R. H. Henke	17	150.00	135.00		
E. A. Willson	18	37.50	37.50		
Joseph D. O'Neill	20	125.00	112.50	Note 3	
Priscilla Larson	36	200.00	175.00		
Carl Jones	48	37.50	45.00	Note 4	7.50

The 'over" adds up to $109.30, but from Note 1 it appears that Victor B. Barkley owes $100.00 (Tr. 94 L. 4) and that he was complained of as occupying only two months at a claimed overcharge of $25.00 per month, so that he has paid only $50.00 or one month's rent and therefore the whole of the $41.50 should be deducted; at Note 2 the Ashmore's apartments show claimed overcharges of $130.00 and the amount due the appellant is

$385.00 for fourteen months, and the overcharge is $5.00 per month for eleven months and $25.00 a month for three months, making a whole of $190.80 which should be deducted; at Note 3 it should be noted that apartment No. 20 was set by the area director at $75.00 and not $50.00 as claimed, and the whole of $112.50 should be deleted; at Note 4 it should be noted that this charge was by the week and is not under rent control and the whole $45.00 should be deleted. The total of these deletions is $430.60, which, to make an accurate computations, should be deducted from the $1,728.96. In addition thereto there appears absolutely no reason, cause or right for the last entry in the list of the judgment "Treasurer of the United States $230.00" and that should be deleted. The total judgment should not in any case exceed $1,068.30. But the whole amount should be denied for the reason that every claimed overcharge was fully explained under the appellant's right to believe that he had a right to charge $75.00 per month for all comparable apartments, and/or he had the right to charge the amounts that he testified that he charged plus the agreed addition for services, furniture or storage and the like, furnished at the request and instance of the tenant. There was no denial of any of these facts by any witness whomsoever. There was no showing whatsoever of actual delivery of notices to the appellant and the only testimony thereon is as stated above by the appellant and his attorney.

SPECIFICATIONS OF ERROR

1. That the Trial Court miscalculated the amounts claimed and judgment given by the Court as stated above.

2. That the Trial Court erred as to Carl Jones as being computed when not under the act.

3. That the Trial Court erred in not giving the appellant properly calculated credit for amounts unpaid to him as against the amounts claimed in the Complaint.

4. That the Trial Court has denied the appellant's right to charge the rentals set or presumed to be set, as the case may be, plus extra services and furniture voluntarily asked of him at the special request of the tenants at an agreed price therefor.

5. That the evidence is insufficient to sustain the Trial Court's findings of fact and judgment.

6. That the Trial Court erred in assuming and judging upon the premise that the appellant had received notices claimed but not proven to have been mailed when the evidence is direct and the proof undisputed that no notices were received by appellant or his attorney.

7. That the Court erred in not taking into consideration that the area rent director and the local rent director by their own acts confused and misled the appellant as to prices and were unfair to the appellant in changing rentals without notice and without regard to comparability or equity.

BRIEF STATEMENT OF ARGUMENT

The argument is self-evident from the statement of the case and the transcript and the contentions set forth above as to the appellant and the acts of the agents of the appellee. The rent control act in its inception was presumed and intended to prevent hardships not only to tenants but to those persons engaged in business which includes landlords. The act is a statutory derogation of the rights of individuals and particularly of landlords and should be construed most firmly against claimed viola-

tions of the act and looking to the end of justice and equity. It is the contention of the appellant that the whole story illicited in this trial is one of a studied or negligent course of conduct on the part of the office of Area or Local Rent Directors, the effect of which was to harass, mislead and get this appellant into difficulties and expense.

The area and local Rent Offices have, for some reason, only known to them, failed, neglected or refused to do equity and should not be permitted to seek redress for any apparent violation caused by their undisclosed orders. Upon its face, it is a flagrant misuse or abuse of delegated powers. The appellant respectfully contends the entire judgment should be reversed.

Respectfully submitted,

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